Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

ROBERT L. BRADDY, and
ROBERT BRADDY HOLDINGS LLC,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. When the United States adopts a state or local seizure of property under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") must the United States prove that the original seizure by state or local law enforcement was a lawful seizure under 18 U.S.C. §§ 981 (b)(2)(C) and 983 (c)(1) for the courts of the United States to have jurisdiction over such action?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner Robert L. Braddy and Robert Braddy Holdings, LLC are interested parties to the proceedings herein. Robert Braddy Holdings, LLC is a privately held corporation with all shares owned by Petitioner Robert L. Braddy. No parent or publicly held company owns 10% or more of the corporation's stock.

Respondent is the United States of America.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT .. 1

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED IN CASE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION ... 9

CONCLUSION 19

INDEX TO APPENDICES

APPENDIX A – 07/31/08 11th Circuit Opinion 1a

APPENDIX B – 09/06/07 District Court Opinion 10a

APPENDIX C – 09/06/07 District Court Judgment 23a

APPENDIX D – 01/13/09 Order Denying Petition for Rehearing En Banc 25a

APPENDIX E – 08/20/08 Petition for Rehearing En Banc 27a

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986). 14

Cady v. Dombrowski,
413 U.S. 433 (1973) 17

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 16, 17

Elkins v. United States,
364 U.S. 206 (1960) 11

Georgia v. Randolph,
547 U.S. 103 (2006) 16

Illinois v. Gates,
462 U.S. 213 (1983) 13

James v. Louisiana,
382 U.S. 36 (1965) 18

Johnson v. United States,
333 U.S. 10 (1948) 15

Katz v. United States,
389 U.S. 347 (1967) 12

Maryland v. Buie,
494 U.S. 325 (1990) 17

McDonald v. United States,
335 U.S. 451 (1948) 16

Michigan v. Tyler,
436 U.S. 499 (1978) 15, 16

One 1958 Plymouth Sedan v. Pennsylvania,
380 U.S. 693 (1965) 10

Payton v. New York,
445 U.S. 573 (1980) 12

United States v. Gonzales,
71 F.3d 819 (11th Cir. 1996) 14

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 10

United States v. Mesa,
660 F.2d 1070 (5th Cir. 1981) (Unit B) 15

United States v. One Assortment of 89 Firearms,
465 U.S. 354 (1984) 10

United States v. Santana,
427 U.S. 38 (1976) 15

Vale v. Louisiana,
399 U.S. 30 (1970) 13, 18

Welsh v. Wisconsin,
466 U.S. 740 (1984) 16

Constitutional Provisions

U.S. Const. Amend. IV 1

Statutes

18 U.S.C. § 981 ..... 2, 9, 10, 12, 18, 19
18 U.S.C. § 983 ..... 2, 3, 9, 11, 18, 19
21 U.S.C. § 881 ..... 1, 2, 9
28 U.S.C. § 1254 1
28 U.S.C. § 2106 3

Congressional Record

H.R. Rep. No. 105-358 (I) (1997), 1997 WL 677201 ..... 10, 11

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 536 F.3d. 1234 (2008) and is reproduced in Appendix A.

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The Eleventh Circuit rendered its decision on July 31, 2008 and denied a Petition for Rehearing and Petition for Rehearing En Banc on January 13, 2009, Appendix D. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision pursuant to a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED IN CASE

Petitioner relies upon the following constitutional provisions, statutes, and rules:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.Const.Amend. IV.

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter

21 U.S.C. § 881 (a)(6).

> Any property subject to forfeiture to the United States under this section may be seized by the Attorney General in the manner set forth in section 981(b) of Title 18.

21 U.S.C. § 881 (b).

> Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if-
>
> the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency

18 U.S.C. § 981 (b)(2)(C).

> In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property-

> The burden of proof is on the Government to establish by a preponderance of the evidence, that the property is subject to forfeiture.

18 U.S.C. § 983 (c)(1).

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106.

STATEMENT OF THE CASE

A. Factual Statement

On June 19, 2005 at approximately 1:00 a.m. Petitioner Braddy was contacted by his home alarm service, informing him that his alarm had been triggered at his residence, 580 Rock Springs Court, Atlanta, Georgia. (R-2:31:1:#1; 3:36:3:#2). The alarm service asked Braddy if he wanted the police to be notified. *Id.* Braddy said "yes." *Id.* Braddy then called Brett Boston, a friend, asking Boston to go to Braddy's home to "make sure that everything was okay." *Id.*

On arriving at Braddy's home, Boston discovered the front door was unlocked. (R-3:36:3:#4). Boston entered the home, walked through it and observed that

the back door had been kicked in from the outside. *Id.* Boston then called Braddy advising Braddy of his (Boston's) observations. *Id.*

The alarm company contacted the DeKalb County Police Department (DCPD) which dispatched Officer Gent to Braddy's home. (R-2:31:1:#8; 3:36:3:#5; 3:48:A:#2). The dispatcher told Gent that an unknown male, who did not have the code to de-activate the alarm, was at Braddy's home. (R-3:48:A:#3). Officer Gent arrived at Braddy's home at approximately 2:05 a.m., over one hour after the initial alarm, and encountered Boston. (R-2:31:1:#9; 3:36:3:#5; 3:48:A:#4-6). Boston informed Officer Gent that the homeowner, Braddy, was out of town; that he was a friend of Braddy's and that Braddy had asked him (Boston) to respond to the alarm. (R-2:31:1:#10; 3:36:3:#5; 3:48:A#7-8). At Gent's request Boston asked Braddy, who was still on the phone, for his alarm code. *Id.* Officer Gent then shut off the alarm. *Id.* Boston showed Gent that he had a key to Braddy's residence. (R-2:31:#11; 3:36:3#6-7; 3:48:A:#9).

Officer Gent "observed that someone had made a forced entry into the Rock Springs property through a rear door" (R-3:48:A:#10). Boston stated that Gent's observation was made while he and Gent were both inside Braddy's home. (R-3:36:3#6). Gent disagreed. (R-3:48:A#6). Gent stated that he "entered the Rock Springs Court property, [taking] a quick walk through [it] to see if anyone was inside [and]...not see[ing] anyone inside [exited]". (R-3:48:A:#11-12; 2:31:1:#13; 3:36:3:#7). Officer Gent's words were "...I went outside." *Id.*

Boston testified that Gent went outside while he (Boston) remained inside continuing to talk to Braddy on the cell phone. (R-3:36:3:#8). Braddy confirmed Boston's testimony that he talked to Boston while Boston and Gent were inside the home. (R-3:36:3#5-9). Boston stated that together he and Gent had walked through Braddy's home finding no one inside. *Id.* Eventually, Boston went outside approaching Officer Gent in the parking lot. *Id.* Boston testified that Gent then placed him (Boston) under arrest based on an outstanding warrant for a probation violation. (R-3:36:3:#9; 3:48:A:#20-21). Gent disputed the timing of Boston's arrest, claiming it occurred after his back-up, Sergeant Violette, arrived at Braddy's home. (R-3:48:A:#19-21). The district court accepted Braddy's version of events as to the timing of Boston's arrest for purposes of resolving the Respondent's motion for summary judgment. Appendix B, page 11a, n 1.

After Gent "went outside" Braddy's home, DCPD Sergeant Violette arrived. (R-3:48:A:#12-13). Earlier, Gent had called Violette informing Violette that he had been dispatched to Braddy's home and had met Boston, "a friend" of the homeowner who was asked to go to the home. (R-3:48:B#3-5). Sergeant Violette stated that after arriving at Braddy's home "Officer Gent and I entered the apartment and conducted a protective sweep to look for intruders. . ." (R-3:48:B:#11). Officer Gent described his second warrantless entry as "...conduct[ing] a protective sweep of the property for anyone hiding inside it." (R-3:48:A:#14). Gent also described it as being a "recheck of the property." ("During the recheck of the property, I noticed in plain view some empty cereal boxes on the kitchen floor.") (R-3:48:A:#14-15).

In addition to observing the cereal boxes during his second warrantless entry, Gent also observed a notebook on a table containing names with the word "owe" next to them followed by figures 200,000, 80,000, 40,000. (R-3:48:A:#16-18; 3:36:3:#11). Around 3:00 A.M., Officer Gent called Detective Rios of DCPD reporting his findings, including the events surrounding Boston's arrest. (R-3:36:3:#12; 3:48:A:#30).

Detective Rios testified that after hearing Officer Gent's report, he concluded that Braddy was a "drug dealer" and that evidence of drug dealing was within Braddy's home. (R-3:36:3:#12-13). Detective Rios prepared a search warrant affidavit reflecting Gent's observations as a factual basis for the warrant. (R-3:36:3:#12-13; 3:42:2).

Detective Rios applied for and obtained a search warrant for Braddy's home. At approximately 1:30 P.M, over twelve hours after Gent's original entry, he entered the premises, observing the blue notebook which had numbers written on its pages. (R-2:31:1:#33-36; 3:36:3:#14). Rios, during his search of Braddy's home, seized $291,828.00, in currency, four new plasma televisions, and various watches and other jewelry. (R-2:31:1:#37-53; 3:36:3:#14). He also seized from Braddy's home various bank account statements identifying monies held by a bank in an account in the name of Petitioner Robert Braddy Holdings LLC. (R-3:36:3:#15-16). Based on this information, together with the original information from Officer Gent, a seizure warrant was obtained by the DCPD and served on the bank resulting in DCPD seizing from that bank account $97,621.44 in funds. *Id.* The United States Justice Department through the Drug Enforcement

Agency (DEA) adopted DCPD's seizures of the currency, electronic equipment, jewelry and funds (Defendant Property). (R-3:36:3:#17).

B. Proceedings Below

On November 28, 2005, Respondent United States of America filed a Complaint For Forfeiture against the items of property seized by DCPD and subsequently adopted for forfeiture by the DEA. (R-1:1:#3). Petitioners Braddy and Robert Braddy Holdings LLC filed their Statement of Interest in the Defendant Property and timely answered the complaint, asserting that the Defendant Property had been illegally seized by DCPD. (R-1:11:14:#9).

In its Initial Disclosures, Respondent stated "[t]he Drug Enforcement Administration ('DEA') has adopted the seizure of the Defendant Currency ($291,828.00), the Defendant Electronic Equipment, the Defendant Jewelry, and the Defendant Funds ($97,621.44)." (R-1:20:10).

After discovery ended Respondent filed a motion for summary judgment. (R-2:31). The Petitioners opposed Respondent's motion and filed their own motion for summary judgment. (R-3:35).

By order dated June 19, 2007 the district court (Batten, J) noting that Petitioners contended that "the Government's forfeiture action [was] predicated on an unlawful warrantless search of [Braddy's] home in violation of the Fourth Amendment... direct[ed] the Government to file a brief...specifically addressing Braddy's constitutional challenge to this forfeiture action." (R-3:47:2). Respondent filed its response,

attaching the declarations of Officers Gent and Violette. Appendix E, pp. 38a-41a.

The district court issued its order granting Respondent's motion for summary judgment and denying Petitioners' motion for summary judgment. Appendix B. The district court made no factual findings as to the lawfulness, or not of the warrantless searches of Braddy's home opting instead to engage in a constitutionally infirmed independent evidence analysis. *Id.* The clerk of the United States District Court for the Northern District of Georgia issued a judgment forfeiting Defendant Property to the Respondent. Appendix C. Petitioners timely appeal to United States Court of Appeals for the Eleventh Circuit. (R-3:54).

The Court of Appeals issued its opinion on July 31, 2008 holding *sua sponte* that "[g]iven the unique and unusual facts of this case, we find that the exigent circumstances exception to the Fourth Amendment did not instantaneously cease upon Gent walking outside." Appendix A, p. 8a-9a. The Eleventh Circuit did not address the district court's rationale for ordering forfeiture noting only that "the district court found that whether or not exigent circumstances existed as of the second search, the government had adequate independently derived evidence to meet its burden." *Id* at 9a. *Id.* Petitioners filed a petition for rehearing *en banc*. Appendix E. On January 13, 2009 the Eleventh Circuit Court of Appeals denied Petitioners' petition for *en banc* review. Appendix D.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition as the Eleventh Circuit in a direct abandonment of this Court's established Fourth Amendment jurisprudence summarily asserted an undefined exigent circumstance without also finding probable cause as justification for two warrantless searches of Petitioner Braddy's home which Respondent contrary to Congressional intent failed to prove led to lawful seizures of property. *See* 18 U.S.C. §§ 981 (b)(2)(C) and 983 (c)(1).

Adoptive Forfeiture Seizures Must Be Lawful

Under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), codified, in part, at 18 U.S.C. §§ 981 and 983, properties seized by state or local law enforcement authorities and adopted for forfeiture by federal authorities must be shown by the Government to have been *lawfully* seized before a United States district court may order the properties to be forfeited. *See* 18 U.S.C. § 981(b)(2)(C). Here the Defendant Properties as required by 21 U.S.C. §§ 881 (a)(6) and 881 (b) were not proven by Respondent to have been lawfully seized pursuant to 18 U.S.C. § 981(b)(2)(C), as shown below. Thus, the Defendant Properties were not property subject to forfeiture to the United States, and the district court was without jurisdiction to enter an order in favor of Respondent resulting in a judgment of forfeiture. The Eleventh Circuit's affirmance of that judgment, albeit on grounds other than found by the district court, likewise failed to hold Respondent to its constitutional and statutorial burden

of proof as required by CARFA and established jurisprudence of this Court.

Before a United States district court has jurisdiction over any property which the Government seeks to forfeit in a civil *in rem* action, the Government must have seized the defendant property. "[S]eizure of the *res* has long been considered a prerequisite to the initiation of *in rem* forfeiture proceedings." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 57 (1993); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984). In seizing the property, Congress incorporated Fourth Amendment jurisprudence. *See* 18 U.S.C. § 981 (b)(2) ("Seizures pursuant to this section *shall* be made pursuant to a warrant *obtained in the same manner as provided for a search warrant* under the Federal Rules of Criminal Procedure except that a seizure may be made without a warrant if – ." (emphasis added)). This Court previously recognized that Fourth Amendment jurisprudence applies to civil forfeiture actions. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965) (evidence seized illegally cannot be used by the Government to satisfy its burden of proof in a civil forfeiture action).

The Congressional Record supports Petitioners' contention that adoptive seizures are only authorized if the defendant property has been *lawfully* seized: "[S]ubsection (b)(2) is revised to make clear that federal authorities do not have to obtain a federal warrant to re-seize property *already lawfully in the possession of state law enforcement authorities when the state elects, in accordance with state law, to turn the property over to the federal government for forfeiture under federal law*." H.R. Rep. No. 105-358 (I)

(1997), 1997 WL 677201 at *50 (emphasis added). Congress made no mistake in explicitly requiring the state or local seizure to be *lawful*. In determining whether the state or local seizure was lawful, Congress recognized that federal law would apply. *Id.* ("If there is a controversy over whether the state seizure of the property was lawful, of course, federal law would control once the property is transferred to federal authority.")

In passing CAFRA, Congress sought to *reform* the law regarding civil asset forfeitures. This reform resulted from past Government abuses of power in the civil asset forfeiture arena. H.R. Rep. No. 105-358 (I) (1997), 1997 WL 677201 at *21-27. By requiring the Government prove adoptive seizures to have been *lawful,* Congress recognized a long established precedent of this Court: "...[E]vidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible [ ]". *Elkins v. United States*, 364 U.S. 206, 223 (1960) (abrogating the "silver platter" doctrine which had allowed federal authorities to use in federal litigation evidence derived from unconstitutional searches and seizures conducted by state authorities.)

Under 18 U.S.C. § 983 (c)(1), the burden of proof is on the Government to establish by a preponderance of evidence that the property is subject to forfeiture. Since this case involved an adoption by federal authorities of seizures of the Defendant Property by DCPD, a local law enforcement agency, Respondent as a jurisdictional predicate was required to prove that DCPD's seizures of the Defendant Properties were

lawful. 18 U.S.C. § 981(b)(2)(C). Respondent failed to so prove, and the Eleventh Circuit in direct conflict with this Court's Fourth Amendment jurisprudence failed to require Respondent to prove the Defendant Properties were lawfully seized. Respondent having failed to prove DCPD's seizures were lawful, the district court was without jurisdiction to enter its order directing forfeiture of Defendant Properties.

Unlawful Seizure by Law Enforcement

It is undisputed that Defendant Properties were seized as a direct result of local law enforcement officers entering Braddy's home without a warrant not once, but twice. ("Gent informed Detective Ulbado Rios of his findings and Rios swore out the affidavit *based on Gent's findings* [ ], obtained a search warrant for Braddy's property [and] [u]pon execution of the warrant, numerous items were seized." (emphasis added) Appendix A, p. 3a.)) "[I]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980). The Government bears the burden of proof that an exception to the Fourth Amendment's warrant requirement applies to overcome the presumptive unreasonableness of the warrantless searches of Braddy's home; namely, that there was both an exigency and probable cause to search.

> "...[o]ur past decisions make clear that only in a few specifically established and well-delineated situations, *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576, may a warrantless search of a dwelling withstand constitutional scrutiny, even though

> the authorities have probable cause to conduct it, the burden rests on the State to show the existence of such an exceptional situation. (cites omitted)." *Vale v. Louisiana*, 399 U.S. 30, 34 (1970).

Here, Officer Gent did not state he entered Braddy's home based on a belief a crime was in progress. Appendix E, pp. 38a-40a.

Initial Entry Without Probable Cause of Ongoing Crime

Probable cause exists when under the "totality-of-the-circumstances. . .there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Here, the issue is not whether there may have been probable cause that evidence of a burglary may have been inside Braddy's home. Rather, as claimed by Gent, the issue was whether from an objective standard there was probable cause a perpetrator might still be inside Braddy's home. There was no such probable cause. Gent certainly did not articulate any such probable cause in his declaration, and neither the district court or the Eleventh Circuit found any probable cause justifying Gent's entry into Braddy's home.

The Eleventh Circuit without any factual and legal support stated "[a] request by a property owner to the police to search a home for a burglar may, in and of itself create '*exigent circumstances*'." (emphasis added) Appendix A. p. 8a. Braddy never talked with Gent or any other law enforcement officer. Consent, as a basis for a warrantless search of a home should never be

implied. *See United States v. Gonzales*, 71 F.3d 819, 830 (11th Cir. 1996). Also, Gent did not ask Boston for consent to search Braddy's home. Appendix E, pp. 38a-40a. Gent did not claim consent as a basis for entering Braddy's home, as Gent claimed he did not meet Boston inside Braddy's home. *Id.* The district court made no findings of fact regarding whether or not Gent's warrantless entries were lawful. As for the Eleventh Circuit, all reasonable inferences should have been drawn in Braddy's favor for the purpose of resolving Petitioners' appeal. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The Eleventh Circuit, notwithstanding its recognition of *Anderson*, did not adopt such inferences but selectively chose facts it claimed supported its findings. Appendix A.

Ultimately, while the Eleventh Circuit did not find consent as a basis for the initial warrantless entry, contrary to this Court's established Fourth Amendment jurisprudence it also failed to address whether Gent had probable cause to enter Braddy's home. Appendix A, p. 8a, fn 2. The initial warrantless entry by Gent was not based on probable cause that an *ongoing burglary* was in progress and an intruder was inside. The totality of the circumstances – over an hour passing since Braddy was initially contacted by the alarm service before Gent arrived at Braddy's home; Gent meeting Boston who had already entered the home walking through it; Gent asking Boston to ask Braddy for the code to de-activate the alarm and Gent and Boston together walking through the home – do not indicate a burglary was still in progress with an intruder still inside. Gent did not state he believed any intruder was inside. Gent simply stated he searched Braddy's home, "looking for anyone inside". Here again, neither the district court or the Eleventh

Circuit found any facts, supporting a conclusion Gent had probable cause to enter Braddy's home. Appendices A and B. Respondent failed to prove probable cause justifying Gent's initial warrantless entry into and search of Braddy's home, and it did not claim consent as a basis for Gent's warrantless entry.

Initial Warrantless Entry Lacked Exigent Circumstances

Without explanation, the Eleventh Circuit found that Gent's initial warrantless entry into Braddy's home was based on exigent circumstances. ("Given the unique and unusual facts of this case, we find that the exigent circumstances exception to the Fourth Amendment did not instantaneously cease upon Gent walking outside." Appendix A, p. 8a-9a). This was error in direct conflict with this Court's decisions.

Gent's initial entry into Braddy's home was not based on any recognized exception by this Court of exigent circumstances. *See Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948). Gent's entry clearly was not a circumstance involving "hot pursuit". *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (holding that hot pursuit means some sort of chase, but need not be an extended chase through the public streets). Gent was not chasing any person. Nor was his entry objectively based on "fleeing suspects" as there was no probable cause of any ongoing burglary. *Id.* See also, *United States v. Mesa*, 660 F.2d 1070, 1078 (5th Cir. 1981) (Unit B). Gent was simply curious and "entered [Braddy's] home...to see if anyone was inside." Gent had no probable cause there was an ongoing burglary. A desire "to see if anyone was inside [Braddy's home]"

is legally insufficient to justify a warrantless entry, particularly when there was time to obtain a warrant. "Where, as here, officers are not responding to an emergency there must be compelling reasons to justify the absence of a search warrant." *McDonald v. United States*, 335 U.S. 451, 454 (1948). Given the length of time (over an hour) between the alarm service notifying Braddy of the alarm being triggered and Gent's arrival at Braddy's home, meeting Boston, obtaining the alarm code from Braddy through Boston, de-activating the alarm and walking with Boston through the home, no emergency existed.

The Eleventh Circuit however, inferred without specifically finding that Gent's initial entry was based on a need to preserve evidence. ("A fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement" citing *Georgia v. Randolph*, 547 U.S. 103, 117 n.6 (2006)). Appendix A, p. 7a. But "looking for anyone inside" as a basis to engage in a warrantless entry, as Gent stated, is not the legal equivalent of seeking to "preserve evidence." There was also no evidence presented by Gent indicating that any evidence of a burglary was subject to being destroyed. There was simply no emergency.

Respondent failed to prove any emergency. The police "bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin*, 466 U.S. 740, 744-745 (1984). More importantly, there was time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (no exigent circumstances if there was time to secure warrant). *Coolidge v. New*

Hampshire, 403 U.S. 443, 481 (1971) ("The warrant requirement. . .is not an inconvenience to be somehow 'weighed' against the claims of police efficiency"). The term "exigent circumstances" refers to a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action. See *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).

Second Warrantless Entry Without Exigent Circumstances

Boston stated that after Gent went outside of Braddy's home, he (Boston) also went outside to the parking lot where Gent arrested him. (R-2:31:1#19-20; 3:36:3#8-9; 3:48:A:#20-21). The district court accepted that Boston was arrested between Gent's first and second warrantless entries into Braddy's home. Appendix B, p. 11a, fn. 1. Gent and Violette's stated purpose of entering Braddy's home on another warrantless search was to engage in a "protective sweep."

"A 'protective sweep' is a quick and limited search of premises, *incident to an arrest* and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990). (emphasis added). But no arrest was made inside Braddy's home. Gent and Violette did not have "a reasonable belief based on specific and articuable facts that the area swept" posed a danger to them. *Id.* Here, Respondent failed to point to any "specific and articuable" facts that would lead a reasonably prudent officer to believe that, at the time of Gent and Violette's sweep of Braddy's home, a sweep was necessary for protective purposes. *Id.* Gent had previously searched the home

and found no one inside. Further, the arrest of Boston outside Braddy's home did not, without more, justify a warrantless entry into Braddy's home. See *James v. Louisiana*, 382 U.S. 36 (1965) (arrest two blocks away did not justify warrantless entry into home); *Vale v. Louisiana*, 399 U.S. 34 (1970) (arrest on sidewalk in front of house did not justify warrantless entry).

Respondent Failed to Prove Lawful Seizures

Petitioners have shown that the warrantless searches of Braddy's home were unlawful. The seizures of Defendant Properties by DCPD were unlawful seizures. The burden of proof, however, is not on Petitioners to prove unlawful seizures. It is on Respondent to prove lawful seizures, 18 U.S.C. §§ 981 (b)(2)(C) and 983 (c)(1).

At the heart of this petition lies the undeniable fact that the declarations of Gent and Violette submitted by Respondent are wholly inadequate to sustain Respondent's burden of proof. Respondent failed to initially address Petitioners' constitutional defense to forfeiture of Defendant Property. The district court ordered Respondent to address Petitioners' defense. Respondent then submitted Gent and Violette's declarations. They are, as shown, insufficient to prove that the Defendant Properties were lawfully seized. As Respondent has failed in its burden of proof, the Defendant Properties were not subject to forfeiture, and the district court was without jurisdiction to enter such an order. The Eleventh Circuit's affirmance of the lower court's judgment by failing to address probable cause and by asserting an undefined exigent circumstance was in direct contravention of established Fourth Amendment jurisprudence of this

Court. Further, the Eleventh Circuit failed to hold Respondent to its burden of proof under 18 U.S.C. §§ 981 (b)(2)(C) and 983 (c)(1), thereby precluding jurisdiction in the lower court over the forfeiture action.

CONCLUSION

Based on the foregoing petition, this Court should grant the petition for certiorari.

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APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-14269
D. C. Docket No. 05-03014-CV-TCB-1

[Filed July 31, 2008]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
versus	)
	)
$291,828.00 In United States Currency, $97,621.44 Seized From Bank of America Account No. XXXXXX6507 in the Name of Robert Braddy Holdings, Inc., ASSORTED ELECTRONIC EQUIPMENT; ASSORTED JEWELRY,	)
	)
Defendants,	)
	)
ROBERT L. BRADDY, ROBERT BRADDY HOLDINGS, LLC,	)
	)
Claimants-Appellants.	)
	)

Appeal from the United States District Court
for the Northern District of Georgia

Before EDMONDSON, Chief Judge, PRYOR, Circuit Judge, and JOHNSON,* District Judge.

PER CURIAM:

Robert L. Braddy appeals the district court's grant of summary judgment in favor of the government in an in rem civil forfeiture proceeding brought pursuant to 21 U.S.C. § 881(a)(7) against money, jewelry and electronic equipment seized from Braddy's home at 580 Rock Springs Court, Atlanta Georgia.

Sometime between 1:00 a.m. and 2:00 a.m., June 19, 2005, while out of town, Braddy was contacted by a representative of ADT Alarm and informed that his burglar alarm had been set off. He was asked by ADT if the police should be dispatched to his home to investigate a possible break-in and Braddy replied yes. Braddy then contacted Brett Boston, a long time acquaintance, and asked Boston to meet the police at Braddy's home. Braddy also informed Boston where to find an extra key for the home. Officer Gent arrived at Braddy's residence where he met Boston and made an initial sweep of the three story home. Gent had already called for back-up. When Officer Violette arrived at the scene, Gent and Violette made a second sweep through the property. During this second search, Gent saw two empty cereal boxes on the kitchen floor and an open ledger notebook with names

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* Honorable Inge P. Johnson, United States District Judge for the Northern District of Alabama, sitting by designation.

and amounts of money with the word "owe" written beside each name. Gent also saw four unopened Hitachi plasma televisions in the garage.

Either between the first and second search, or after the second search, Gent learned there was an outstanding warrant for Boston's arrest for a probation violation on a prior marijuana conviction. Gent arrested Boston. In the process of Boston's arrest and moving Boston's car with his consent, Gent detected a strong odor of marijuana, as well as scales and a money counter in the back seat.

Gent informed Detective Ulbado Rios of his findings, and Rios swore out an affidavit based on Gent's findings and obtained a search warrant for Braddy's property. Upon execution of the warrant, numerous items were seized. The government filed a civil forfeiture complaint pursuant to 21 U.S.C. § 881(a)(6) in connection with the money, jewelry and electronic equipment seized from Braddy's home. In the district court, both parties moved for summary judgment and Braddy also moved to suppress the evidence seized from his home on the theory that the second search of his premises violated his Fourth Amendment rights. The district court granted summary judgment in favor of the government and against Braddy, holding that sufficient, independently-derived, evidence supported a finding that the government met its burden to prove that the seized property was subject to forfeiture as having been furnished in exchange for a controlled substance or constituting proceeds from the same.

On appeal, the parties' arguments focus on whether there were exigent circumstances sufficient to justify

the second sweep of the property without Braddy's consent and without a warrant. Braddy further argues that the warrant obtained after the second search is invalid because it was based on evidence from the second search. Braddy asserts that the government ultimately failed to meet its burden that the property should be forfeited as all evidence of illegal activity stemmed from the second search.

This court reviews a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the party opposing the motion. Skrtich v. Thorton, 280 F.3d 1295, 1299 (11th Cir. 2002). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990). All reasonable inferences must be drawn in Braddy's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2502, 91 L.Ed.2d 202 (1986).

Property is subject to civil forfeiture under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 981(b) and 21 U.S.C. § 881(b), when it was "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a drug trafficking offense that is "punishable by more than one year's imprisonment." 21 U.S.C. § 881(a)(7). Additionally, 21 U.S.C.A. § 881(a)(6), specifies the following property is subject to forfeiture:

> All moneys ... furnished or intended to be furnished by any person in exchange for a

> controlled substance or listed chemical violation of this subchapter, all proceeds traceable to such an exchange, and all moneys ... used or intended to be used to facilitate any violation of this chapter.

21 U.S.C.A. § 881(a)(6).

To obtain civil forfeiture, the government must establish by a preponderance of evidence "a substantial connection between the property and the offense." 18 U.S.C. § 983(c)(1) and (3). The government "may use both circumstantial evidence and hearsay," and the district court should evaluate the evidence presented with "a common sense view to the realities of normal life." United States v. Four Parcels of Real Property, 941 F.2d 1428, 1440 (11th Cir.1991) (internal citations and quotation marks omitted). The government may also use evidence gathered after the filing of the complaint for forfeiture to meet its burden. 18 U.S.C. § 983(c)(2).

The manner in which the seizure occurred and the validity of the warrant obtained are at issue in this appeal. Section 981(b) of Title 18, provides that seizures must be made pursuant to a warrant or, if made without a warrant, at the time of the seizure there must be probable cause to believe the property is subject to forfeiture and the seizure must be made pursuant to a lawful arrest or search or pursuant to some other exception to the Fourth Amendment warrant requirement.[1] 18 U.S.C.A. § 981(b)(2)(B).

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[1] There is no evidence that anything was *seized* from Braddy's home prior to Gent obtaining a warrant.

Section 981(b) also allows for seizure without a warrant if "the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency." 18 U.S.C.A. § 981(b)(2)(C). The Fourth Amendment exclusionary rule applies to civil forfeiture actions. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170 (1965). However, even if evidence is subject to suppression, the government may obtain forfeiture based on other independent evidence. Id.

Searches inside a residence without a warrant are presumptively unreasonable, absent either probable cause or exigent circumstances. United States v. Santa, 236 F.3d 662, 668 (11th Cir. 2000). "The exigent circumstances exception to the requirement recognizes a warrantless entry by criminal law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant." Bashir v. Rockdale County, 445 F.3d 1323, 1328 (11th Cir. 2006). The exception applies only if the police reasonably believe that an emergency situation justified warrantless action. United States v. Holloway, 290 F.3d 1331, 1337 (11th Cir. 2002). A second exception

> [t]o the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable per se, Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) .... [is] the validity of searches with the voluntary consent of an individual possessing authority, Rodriguez, 497 U.S., at 181, 110 S.Ct. 2793. That person might

> be the householder against whom evidence is sought, Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)....

Georgia v. Randolph, 547 U.S. 103, 109, 126 S.Ct. 1515, 1520 (2006).

Both before the district court and here, Braddy contends that Gent's and Violette's second protective sweep of the property was not within the exigent circumstances exception to the need for a warrant. The parties agree that the open cereal boxes and ledger were not observed by Gent prior to the second sweep. The evidence established that the search warrant was procured based on these and other observations made during the second sweep.

The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case. Sibron v. New York, 392 U.S. 40, 59, 88 S.Ct. 1889, 1901, 20 L.Ed.2d 917, 932 (1968). Here, Officer Gent knew he was called to a residence in the middle of the night because a burglar alarm had sounded. He knew the home owner had requested the police to investigate the possible burglary. Prior to the arrival of Violette, Gent took a "quick walk" through the residence. Once a second officer arrived, the officers together made a second sweep of the property, a multi-storied apartment, again to look for an intruder. A fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement. Georgia v. Randolph, 547 U.S. 103, 117, 126 S.Ct. 1515, 1525 n. 6 (U.S.2006), citing cf.

Schmerber v. California, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). There is no evidence nor argument that during this second sweep the officers looked in any place other than where a person could be found.

Braddy's entire theory of unlawful search rests on the fact that Gent walked outside after the "quick walk" through and then, with a second officer, re-entered the premises to make sure there was no intruder present. Braddy does not dispute that he requested a police officer be sent to his home for this very purpose.[2] However, Braddy seemingly wants this court to adopt a bright line as to how thoroughly officers may look for an intruder under these circumstances. Under Braddy's arguments, had Gent waited just inside the "kicked in" back door, exigent circumstances would still be in place. Similarly, had Gent heard and/or seen an intruder and walked outside to make sure he had back-up before attempting an arrest, exigent circumstances would no longer exist and he would have had to wait for a warrant to reenter the home. The court cannot draw such a bright line for when exigent circumstances cease to exist.

Given the unique and unusual facts of this case, we find that the exigent circumstances exception to the

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[2] A request by a property owner to the police to search a home for a burglar may, in and of itself create "exigent circumstances." Requests by the property owner of the police to investigate a burglar alarm could also be considered "consent" for the search of the home. However we do not reach the issue of consent to the search as it was not argued to the District Court nor raised in briefs to this court.

Fourth Amendment did not instantaneously cease upon Gent walking outside.

When reviewing a grant of summary judgment, the court of appeals may affirm if there exists any adequate grounds for doing so, regardless of whether it is the one on which the district court relied. Smith v. Allen, 502 F.3d 1255, 1265 (11th Cir.2007); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1117 (11th Cir. 1993) (citations omitted). The district court here noted that Braddy argued that the second sweep of the property did not fall within the exigent circumstances, but did not reach that issue. Rather, the district court found that whether or not exigent circumstances existed as of the second search, the government had adequate independently-derived evidence to meet its burden.

Because we find that exigent circumstances existed, and therefore the evidence obtained after the search warrant issued was admissible, the rulings of the district court, granting judgment in favor of the appellee, and entering the Order of Forfeiture, are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION FILE No. 1:05-cv-3014-TCB

[Filed September 6, 2007]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
$291,828.00 IN UNITED STATES CURRENCY, $97,621.44 SEIZED FROM BANK OF AMERICA ACCOUNT NUMBER XXXXXX6507 IN THE NAME OF ROBERT BRADDY HOLDINGS, LLC, ASSORTED ELECTRONIC EQUIPMENT; AND ASSORTED JEWELRY,	)
	)
Defendants,	)
	)

ORDER

I. Background

In the early morning hours of June 19, 2005, after learning that his burglar alarm had been activated,

Robert L. Braddy, Jr. requested that the police be dispatched to his residence at 580 Rock Springs Court, Atlanta, Georgia, to investigate a possible break-in. Braddy, who was out of town, then contacted Brett Boston, an acquaintance of ten years, to ask him to check on the residence.

Officer Gent of the DeKalb County Police Department arrived at Braddy's residence at approximately 2:05 a.m., where he met Boston. Officer Gent made an initial sweep of the property, and when back-up arrived, he and another officer made a second protective sweep. During the second sweep of the property, Officer Gent observed in plain view two empty cereal boxes on the floor of the kitchen and an open ledger notebook containing a list of names and large amounts of money with the word "owe" written beside each name. Officer Gent also observed four unopened Hitachi plasma televisions in the garage.

While at the residence, Officer Gent discovered that there was an outstanding warrant for Boston, so he arrested him for violating his probation on a marijuana conviction.[1] In fact, Boston had two previous arrests connected to marijuana: an arrest in 2004 for possession of less than one ounce, and an arrest in 2005 for possession with intent to distribute. In the process of arresting Boston, Officer Gent moved

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[1] The parties dispute the timing of these events. The Government alleges that the arrest took place after the second protective sweep, while Braddy asserts that the arrest was made between the two searches of the property. For purposes of resolving the Government's motion for summary judgment, the Court adopts Braddy's version of the events, as he is the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Boston's Lexus SW with Boston's consent. When he entered the car, he detected a strong odor of marijuana and noted an industrial-sized scale, a small scale, and a money counter in the back seat. At some point during the exchange, a third police officer arrived with a certified and trained drug detection dog, which alerted to the odor of narcotics at several places on the Lexus.

Officer Gent then relayed his findings to Detective Ubaldo Rios. Detective Rios swore out an affidavit based on Officer Gent's findings and obtained a warrant for the Rock Springs property.[2] When Detective Rios executed the warrant, he seized many items, including a marijuana cigarette, the ledger referenced above, a black trash bag containing marijuana, two zip-lock bags of U.S. currency, four Hitachi televisions, a 14-kt white gold bracelet with diamonds, an Iceman brand watch with diamonds, and a shoe-box filled with U.S. currency. In total, Rios seized $291,828 in U.S. currency from the Rock Springs property.

DeKalb County detectives interviewed Boston later that day.[3] Boston claimed during that interview that he owned the money counter and the scales found in his Lexus. However, in a later interview, Boston confessed that Braddy had asked him to take the

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[2] Detective Rios suspected that Braddy was involved in the distribution and manufacturing of illegal narcotics. According to his affidavit, drug traffickers often hide illegal narcotics and money in cereal boxes to avoid detection and theft.

[3] Boston waived his right to an attorney prior to being interviewed.

money counter and scales from his residence before the police showed up in response to the alarm.[4]

After interviewing Boston on June 19, DeKalb County officers conducted surveillance of Boston's apartment and watched an unidentified male enter Boston's building several times and load two pet crates and a bag into his vehicle. Officers followed the man, later identified as Mark Streater, when he left the complex, and pulled him over for making an improper lane change. After Streater consented, the officers searched his car and found several incriminating items, including nine individually wrapped bags of marijuana and a digital scale. When interviewed, Streater confessed that the marijuana had come from Boston's apartment.[5] The officers also discovered that Streater had been arrested in 2004 by Cobb County police officers for possession of marijuana. Braddy's name and phone number were listed in Streater's cell phone directory.

Officers also obtained a warrant for and searched Boston's residence. During the search, they seized several items, including approximately ten pounds of marijuana, three handguns, three scales, an automatic joint-rolling machine and large glass pipes.

During the ensuing investigation, officers discovered that Braddy owned or controlled three bank accounts at Bank of America and obtained a search

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[4] Braddy disputes Boston's statement.

[5] Streater waived his right to an attorney prior to being interviewed.

warrant for all three accounts. Officers seized $97,621.44 in suspected drug proceeds from the accounts.

The Government filed this civil forfeiture action on November 28, 2005. The Government now moves for summary judgment of forfeiture. Braddy and his company, Robert Braddy Holdings, LLC, as claimants of the seized property, filed a response to this motion, asserting that the Government has not met its burden of production with lawfully obtained evidence, and therefore, the seized property is not subject to forfeiture. Claimants separately have filed their own motion for summary judgment asserting the same argument.[6] The Court finds Claimants' arguments unpersuasive and therefore grants the Government's motion for summary judgment and denies Claimants' motion.

II. Analysis

A. Summary Judgment Standard

Summary judgment is proper when no genuine issue of material fact is present, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant carries the initial burden and must show that there is "an absence of evidence to

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[6] Claimants' motion for summary judgment was untimely filed eight days after the deadline set by the local rules passed. The Court grants Claimants' motion for leave to file their motion for summary judgment out of time and has considered Claimants' argument, as it was laid out in both Claimants' response to the Government's motion for summary judgment and in Claimants' motion for summary judgment.

support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required to "go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. Resolving all doubts in favor of the nonmoving party, the Court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

B. Civil Forfeiture Standard

In a civil forfeiture action, the Government has the burden to show by a preponderance of evidence that the seized property is subject to forfeiture. 18 U.S.C. § 983(c)(1). "The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.'" *U.S. v. Real Prop. in Section 9, Town 29 N., Range 1 W.*, 308 F. Supp. 2d 791 (E.D. Mich. 2004) (*quoting Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)). In meeting its burden, the Government may use evidence "gathered after the filing of a complaint for forfeiture to establish . . . that

[the seized] property is subject to forfeiture." 18 U.S.C. § 983(c)(2). Finally, the court must take a "common sense view to the realities of normal life" applied to the "totality of the circumstances" instead of viewing the evidence with "clinical detachment." *U.S. v. Carrell*, 252 F.3d 1193, 1201 (11th Cir. 2001) (citations omitted).

Property subject to forfeiture includes property that is "furnished or intended to be furnished by any person in exchange for a controlled substance . . . in violation of [the Drug Abuse Prevention and Control Act], [and] all proceeds traceable to such an exchange." 21 U.S.C. § 881(a)(6).

After reviewing the evidence in the light most favorable to Claimants, the court finds that the Government has met its burden to prove by a preponderance of the evidence that the seized property is subject to forfeiture under 21 U.S.C. § 881(a)(6).

Claimants argue that the seizure of the $291,828 in U.S. currency from Braddy's residence was unlawful, and therefore the currency and any evidence discovered as a result of its seizure may not be considered in determining whether the Government has met its burden.[7] Specifically, Claimants challenge

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[7] In addition to asserting this argument in their motion for summary judgment and their response to the Government's motion for summary judgment, Claimants have filed a motion in limine to suppress all evidence from the second sweep and the subsequent search by Detective Rios. The Court denies Claimants' motion in limine as an improper avenue to suppress this evidence. *See U.S. v. One Piece of Real Prop. Located at 5800 SW 74th Ave.*, 363 F.3d 1099, 1101 (11th Cir. 2004) (stating that "a claimant in

Officer Gent's second sweep of the property as not falling within the exigent circumstances exception to the need for a warrant. Notably, Officer Gent did not discover the open cereal boxes and the ledger until his second sweep. Consequently, Claimants argue, Gent's findings could not form the basis for the warrant that Detective Rios executed the next day, and both the second sweep and the subsequent warranted search violated Braddy's Fourth Amendment rights.

Claimants further argue that without the unlawfully seized evidence, the Government cannot meet its burden of proof. Contrary to Claimants' assertion, the Government has adequate independently-derived evidence to meet its burden.

The Fourth Amendment applies in civil forfeiture proceedings, and therefore, evidence seized illegally cannot be used by the Government to satisfy its burden of proof. *One 1958 Plymouth Sedan v. Pa.*, 380 US. 693, 702 (1965). However, "the mere fact of the illegal seizure, standing alone, does not immunize the goods from forfeiture." *U.S. v. One 1971 Harley-Davidson Motorcycle Serial #4A25791H1, its Tools & Appurtenances*, 508 F.2d 351, 351 (9th Cir. 1974); *U.S. v. $174,206.00 in U.S. Currency*, 320 F.3d 658, 663 (6th Cir. 2003). Rather, if there is sufficient independent evidence to prove the property is subject to forfeiture, the fact that the "contraband [was] seized

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a civil forfeiture action [who] wishes to challenge the admissibility of evidence obtained during a search of his property . . . must do so by way of a timely pretrial motion to suppress evidence"); *U.S. v. Corggens*, No. 90-3351, 1990 WL 208764, at *4 (6th Cir. Dec. 18, 1990) ("A motion in limine does not challenge the legality of the search but, rather, its prejudicial nature.").

in violation of the possessor's Fourth Amendment rights," will not defeat the Government's case. *Harley-Davidson Motorcycle*, 508 F.2d at 352. Here, there is sufficient independently-derived evidence to prove the seized property is subject to forfeiture.

When the Government produces evidence that a claimant has "insufficient [legitimate income] . . . to explain the large amount of currency found in [his] possession," which evidence is "unrebutted by any evidence pointing to any other source of legitimate income or any evidence indicating innocent ownership," it has satisfied its burden under 21 U.S.C. § 881(a)(6). *U.S. v. $174,206.00 in U.S. Currency*, 320 F.3d 658, 662 (6th Cir. 2003); *see also Carrell*, 252 F.3d at 1201 (lack of a "visible source of substantial income" is probative evidence in a civil forfeiture proceeding); *U.S. v. $30,670 in U.S. Funds*, 403 F.3d 448, 468 (7th Cir. 2005) (district court is entitled to rely on claimant's tax returns in determining that claimant lacked sufficient legitimate income to account for possession of large quantity of currency).

The Government relies heavily on Braddy's tax returns and bank records[8] in support of its motion for summary judgment. From 2000 to 2004, Braddy's

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[8] Braddy produced copies of his tax returns during discovery. The Government also obtained copies of the tax returns from the Internal Revenue Service (IRS) with Braddy's consent and subpoenaed copies of Braddy's bank records from Bank of America, Lockheed Georgia Employees' Federal Credit Union and Wachovia Bank.

adjusted gross income totaled just over $60,000.[9] In fact, in 2003, Braddy reported a net loss of $35,002 on his tax return, and in 2004 he claimed only $12,147 of income. Yet between January 1, 2002 and July 16, 2006, Braddy deposited $1,848,625.87 into twelve bank accounts, including over $500,000 in 2004 alone.[10] The discrepancy between Braddy's reported income and the money in his possession–both at his residence and in his bank accounts–is rebuttable evidence that the seized property is subject to forfeiture. Only if Braddy can point to another legitimate source of income or can allege innocent ownership will the Government's case fail.

However, Braddy has offered scant evidence to account for this discrepancy. He claims to have received the seized money as proceeds from the sale of several rental properties. However, he sold one of the referenced properties *after* the Government's seizure. Further, although his bank records list a deposit of $13,446.05 the day after the sale of a second rental property, those funds were depleted from the account within the month of their deposit and therefore cannot constitute a portion of the currency seized. Braddy has therefore failed to produce sufficient evidence to rebut the Government's case. *See U.S. v. Two Parcels of Real Prop. Located in Russell County, Ala.*, 92 F.3d 1123, 1129 (11th Cir. 1996) ("The mere allegation of a highly unlikely legitimate source of income without some support to give the allegation credibility cannot

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[9] As of the Government's filing of its motion for summary judgment, Braddy had not filed a tax return for 2005.

[10] Of the $500,000, $397,157 was deposited in the form of cash.

constitute an issue of material fact defeating summary judgment for forfeiture."). Therefore, the Government has satisfied its burden and the seized property is subject to forfeiture.

Other evidence also supports forfeiture of the seized property. In forfeiture cases, the "quantity of cash seized . . . is [itself] highly probative of a connection to some illegal activity." *U.S. v. $121,100.00 in U.S. Currency*, 999 F.2d 1503, 1507 (11th Cir. 1993) (noting, however, that the quantity of cash is not conclusive evidence of forfeiture). Here, the Government seized almost $400,000 from Braddy's residence and bank accounts, a substantially greater amount than the Eleventh Circuit has found probative in previous cases. *See, e.g., id.*

Finally, a claimant's "history of narcotics arrests and convictions" is probative evidence supporting forfeiture. *$121,000*, 999 F.2d at 1507. During his deposition, Braddy admitted ownership of the marijuana cigarette seized from his residence and that he had been a long-time marijuana user. He also testified that he had pled guilty to a marijuana possession charge in Mississippi in 1994.[11] Braddy's testimony, as well as the evidence that his name and number were listed in the cell phone belonging to Streater–who admitted to being involved in the distribution of marijuana–strengthen the Government's case for forfeiture. *See id.*

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[11] During his deposition, Braddy claimed that although he pled guilty to the charge, he was not actually guilty. He testified that he had decided to plead guilty rather than "keep traveling back and forth to [to Mississippi] to prove [his] innocence,"

Braddy's lack of legitimate income to explain the large amount of money found in his possession, his prior criminal history, his association with admitted distributors of marijuana, and the amount of money seized from his residence and bank accounts provide independent evidence of the seized property's involvement in the illegal drug trade. The Court, taking a "common sense view to the realities of normal life," and viewing the "totality of the circumstances," finds that the Government has met its burden to prove that the seized property is subject to forfeiture as having been furnished in exchange for a controlled substance or constituting proceeds from same. *See Carrell*, 252 F.3d at 1201. Accordingly, the Court grants the Government's motion for summary judgment.[12]

III. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for summary judgment [31] and Claimants' motion for leave to file motion out of time [36], and **DENIES** Claimants' motion for summary

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[12] Claimants have also moved to strike the Government's supplemental brief addressing Claimants' constitutional challenge to the forfeiture action because it introduces two new police officer affidavits outside of the discovery period. The affidavits supplement the Government's factual account of the timeline for the search of the Rock Springs property as justification for the legality of that search. Claimants' motion to strike is denied as moot due to the Court's determination that the Government has sufficient independent evidence to support its motion for summary judgment despite the potential illegality of the search of the Rock Springs property.

judgment [36, Exhibit 1], Claimants' motion to strike [49] and Claimants' motion in limine [41].

IT IS SO ORDERED this 6th day of September, 2007.

/s/
Timothy C. Batten, Sr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. 1:05-cv-3014-TCB

[Filed September 6, 2007]

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	)
$291,828.00 In United States Currency, et al, Defendant,	)
ROBERT L. BRADDY Claimant	)
BRETT L. BOSTON Claimant	)

JUDGMENT

This action having come before the court, Timothy C. Batten, Sr., United States District Judge, for consideration of Plaintiff's motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the defendants be, and the same hereby are, **forfeited** to the United States.

Date at Atlanta, Georgia this 6th day of September, 2007.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Harry F. Martin
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
September 6, 2007
James N. Hatten
Clerk of Court

By: s/ Harry F. Martin
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-14269-DD

[Filed January 13, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
versus	)
	)
$291,828.00, In United States Currency, $97,621.44, Seized From Bank of America Account No. XXXXXX6507 In the Name of Robert Braddy Holdings, Inc., ASSORTED ELECTRONIC EQUIPMENT, ASSORTED JEWELRY,	)
	)
Defendants,	)
	)
ROBERT L. BRADDY, ROBERT BRADY HOLDINGS, LLC,	)
	)
Claimants-Appellants.	)

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

BEFORE: EDMONDSON, Chief Judge, PRYOR, Circuit Judge, and JOHNSON,* District Judge

PER CURIAM:

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE

ORD-42
(2/05)

---

* Honorable Inge P. Johnson, United States District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 07-14269-DD

[Filed August 20, 2008]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
$291,828.00 IN UNITED STATES CURRENCY; $97,621.44 SEIZED FROM BANK OF AMERICA ACCOUNT NO. XXXXXX6507 IN THE NAME OF ROBERT BRADDY HOLDINGS LLC; ASSORTED ELECTRONIC EQUIPMENT; AND ASSORTED JEWELRY,	)
	)
Defendants.	)
	)
ROBERT L. BRADDY AND ROBERT BRADDY HOLDINGS LLC	)
	)
Claimants-Appellants.	)
	)

On Appeal from the United States District Court
for the Northern District of Georgia
Atlanta Division

PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

COME NOW, Robert L. Braddy and Robert Braddy Holdings, LLC, Claimants-Appellants herein, and file this Certificate of Interested Persons and Corporate Disclosure Statement, listing the trial judge(s), attorneys, persons, associations of persons, firms, partnerships and corporations that have an interest in the outcome of this appeal, including any subsidiaries, conglomerates, affiliates and parent corporations, publicly held companies that own 10% or more of a party's stock and other identifiable legal entities related to a party, as follows:

Timothy C. Batten, Sr., United States District Judge;
Brett L. Boston, Claimant;

R. David Botts, Esq., counsel for Claimants-Appellants;

Robert L. Braddy, Claimant-Appellant;

Robert Braddy Holdings LLC, Claimant-Appellant, a Georgia Limited Liability Corporation;

Michael Brown, Esq., Assistant United States Attorney, counsel for Plaintiff-Appellee;

Paul M. Cognac, Esq., counsel for Claimant Brett L. Boston;

David E. Nahmias, Esq., United States Attorney;

Wilmer Parker, III, Esq., counsel for Claimants-Appellants;

John Russell Phillips, Esq., Assistant United States Attorney, counsel for Plaintiff-Appellee

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This 20th day of August, 2008.

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this

Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, (1978)

Johnson v. United States, 333 U.S. 10, 14-15, 68 S.Ct. 367, 369 (1948)

Maryland v. Buie, 494 U.S. 325, 327, 110 S.Ct. 1093 (1990)

United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir. 1991) (*en banc*)
United States v. Santa, 236 F.3d 662, 668 (11th Cir. 2000)

United States v. Burgos, 720 F.2d 1520, 1525 (11th Cir. 1983)

United States v. Chaves, 119 F.3d 687, 692 (11th Cir. 1999)

United States v. Lynch, 934 F.2d 1226 (11th Cir. 1991)

United States v. Tovar-Rico, 61 F.3d 1529 (11th Cir. 1995)

Wilmer Parker
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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

STATEMENT OF COUNSEL i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

I. Course of Proceedings and Disposition 1

II. Statement of Facts 2

ARGUMENT AND CITATION OF AUTHORITIES 2

WHETHER THE PANEL OPINION AFFIRMING FORFEITURE OF DEFENDANT PROPERTIES CONTRAVENES PRECEDENT OF THE SUPREME COURT AND THIS COURT BY FINDING EXIGENT CIRCUMSTANCES JUSTIFYING TWO WARRANTLESS SEARCHES OF CLAIMANT BRADDY'S HOME?

A. Officer Gent's and Violette's Relevant Statements 4

B. Braddy's Statements to ADT 7

C. Panel Opinion's Erroneous Statements and Legal Conclusions 7

D. Protective Sweep 9

E. Initial Warrantless Entry Lacked Exigent Circumstances 10

CONCLUSION 15

CERTIFICATE OF SERVICE 17

COPY OF OPINION

TABLE OF AUTHORITIES

Cases

Georgia v. Randolph, 547 U.S. 103 (U.S. 2006) 12, 13 n.4

Johnson v. United States, 333 U.S. 10 (1946) i, 12

Maryland v. Buie, 494 U.S. 325 (1990) i, 9, 10

Michigan v. Tyler, 436 U.S. 499 (1978) i, 11, 12, 13

Payton v. New York, 445 U.S. 573 (1980) 3

United States v. $291,828.00, et al., _____ F.3d _____, 2008 WL 2937787 2

United States v. Burgos, 720 F.2d 1520 (11th Cir. 1983) — i, 11, 13

United States v. Chaves, 119 F.3d 687 (11th Cir. 1999) — i, 10

United States v. Davis, 313 F.3d 1300 (11th Cir. 2002) — 3, 8 n.2

United States v. Gonzales, 71 F.3d 819 (11th Cir. 1996) — 13

United States v. Holloway, 290 F.3d 1331 (11th Cir. 2002) — 3

United States v. Lynch, 934 F.2d 1226 (11th Cir. 1991) — i, 14

United States v. Mesa, 660 F.2d 1070 (5th Cir. 1981) (Unit B) — 12

United States v. Santa, 236 F.3d 662 (11th Cir. 2000) — i, 3

United States v. Santana, 427 U.S. 38 (1976) — 12

United States v. Tobin, 923 F.2d 1506 (11th Cir. 1991) (*en banc*) — i, 3, 12

United States v. Tovar-Rico, 61 F.3d 1529 (11th Cir. 1995) — i, 15

United States v. Young, 909 F.2d 442 (11th Cir. 1998) — 11

STATEMENT OF THE ISSUE

Whether the panel Opinion affirming forfeiture of Defendant Properties contravenes precedent of the Supreme Court and this Court by finding exigent circumstances justifying two warrantless searches of Claimant Braddy's home?

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition of the Case

On November 28, 2005 the government filed a Complaint For Forfeiture against various items of property. 1:1: ¶ 3. The Claimants answered on February 1, 2006, asserting that the Defendant Property had been illegally seized by the DeKalb County Police Department (DCPD). 1:14: ¶ 9.

In its Initial Disclosures, Plaintiff stated "[t]he Drug Enforcement Administration ('DEA') has adopted the seizure of the Defendant Currency ($291,828.00), the Defendant Electronic Equipment, the Defendant Jewelry, and the Defendant Funds ($97,621.44)." 1:20:10. Discovery ended on September 11, 2006. 1:28.

On October 2, 2006 Plaintiff filed for summary judgment. 2:31. The Claimants on October 10, 2006 responded to the Plaintiff's motion, 3:35, and also filed a motion for summary judgment. 3:36. On June 19, 2007 the lower court (Batten, J), noting that Claimants' contended that "the Government's forfeiture action [was] predicated on an unlawful warrantless search of [Braddy's] home in violation of the Fourth Amendment... direct[ed] the Government to file a brief...specifically addressing Braddy's

constitutional challenge to this forfeiture action." 3:47:2. Plaintiff responded on June 29, 2007.

On September 6, 2007 the lower court issued its order granting Appellee's motion for summary judgment and denying Appellants' motion for summary judgment. 3:52. The clerk thereafter issued a judgment in favor of Appellee, forfeiting Defendant Property to the Plaintiff. 3:53. On September 11, 2007 the Claimants timely filed their Notice of Appeal.

On May 15, 2008, oral argument was conducted in this Court. On May 29, 2008, the panel granted Claimants' Motion for Leave to File Supplemental Brief regarding the issue of consent. The Appellee responded on June 12, 2008. On July 31, 2008 the panel Opinion, *United States v. $291,828.00, et al.*, _____ F.3d _____, 2008 WL 2937787, was issued. This petition has been timely filed.

II. Statement of the Facts

The panel Opinion sets out the facts in this case. Opinion * 1-2. Additional facts relevant to the issue raised as a basis for rehearing will be set forth below.

ARGUMENT AND CITATION OF AUTHORITIES

Containing both errors of law and facts, the panel Opinion, while recognizing that DCPD Officer Gent entered Claimant Braddy's home conducting warrantless searches not once, but twice, held "[g]iven the unique and unusual facts of this case, we find that the exigent circumstances exception to the Fourth Amendment did not instantaneously cease upon Gent walking outside [of Claimant Braddy's home prior to

Gent's warrantless re-entry into the home.] Opinion * 4. The panel Opinion further erroneously held that "[b]ecause we find that exigent circumstances existed, and therefore the evidence obtained after the search warrant issued was admissible, the rulings of the district court, granting judgment in favor of the Appellee, and entering the Order of Forfeiture are AFFIRMED." *Id.* The warrantless entries by Officer Gent into Braddy's home were not justified based on the exigent circumstances exception to the Fourth Amendment and were *per se* unreasonable. *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d. 639 (1980).

The panel Opinion stated that "[s]earches inside a residence without a warrant [are] a (sic) presumptively unreasonable, absent either probable cause or exigent circumstances" citing *United States v. Santa*, 236 F.3d 662, 668 (11th Cir. 2000). Opinion * 2. This Court has held that "[a] warrantless search is allowed, however, where both probable cause and exigent circumstances exist," *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991) (*en banc*). "The government bears the burden of proving...both an exigency and probable cause." *United States v. Davis*, 313 F.3d 1300, 1302 (11th Cir. 2002) (citing *United States v. Holloway*, 290 F.3d 1331, 1334 (11th Cir. 2002)). Here, the government failed in its burden of proof, and the panel Opinion erred in finding that Gent's second and Violette's initial warrantless entry into Braddy's home was based on exigent circumstances and therefore lawful.

A. Officer Gent's and Violette's Relevant Statements

After discovery closed, the government submitted, pursuant to direction of the lower court, *supra*, p. 2, declarations of DCPD Officers Gent and Violette. Record Excerpts (R.E.) 48-2 and 48-3.[1] In pertinent part Officer Gent stated:

> I am an officer with the DeKalb County Police Department in Decatur, Georgia. I have been so employed since March 2002.
>
> On June 19, 2005, at approximately 1:50 a.m., I was dispatched by DeKalb County 911 emergency personnel to 580 Rock Springs Court, Atlanta, Georgia ("the Rock Springs Court property") to investigate an activated burglar alarm at the residence.
>
> The dispatcher stated that an unknown male, who did not have the code to deactivate the alarm, was at the Rock Springs Court property.
>
> I responded to the alarm call and arrived at the Rock Springs Court property at approximately 2:05 a.m.
>
> The Rock Springs Court property is a large, three-story apartment unit.

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[1] The Claimants had previously subpoenaed Officer Gent seeking to depose him. His deposition was twice scheduled, but Officer Gent failed to appear, offering no explanation for his last failure. Braddy Affidavit, pp. 179-83. [Doc. 31]. Gent, therefore has not been cross-examined.

Upon arriving at the Rock Springs Court property, I spoke with Brett Boston, who was standing outside the residence.

Boston told me that the homeowner, Robert Braddy was out of town.

Boston also told me that he was a friend of Braddy's and that Braddy had called and asked him to respond to the residence because of the activated alarm.

Boston had a key to the Rock Springs Court property in his possession.

I observed that someone had made a forced entry into the Rock Springs Court property through a rear door, and I called for back-up assistance at the scene.

I entered the Rock Springs Court property while Boston remained outside, and I took a quick walk through the residence to see if anyone was inside.

During that brief check, I did not see anyone inside the residence, and I went outside.

After a few minutes, Sergeant Violette arrived at the Rock Springs Court property.

Because the Rock Springs Court property is a large, three-story apartment unit, an intruder could have moved from room to room or from floor to floor as I briefly checked it. Consequently, Sergeant Violette and I

conducted a protective sweep of the property for anyone hiding inside it.

[Record Excerpts 48-2, ¶¶ 1-14].

In pertinent part Officer Violette stated:

I am a sergeant with the DeKalb County Police Department in Decatur, Georgia. I have been so employed since 1987.

On June 19, 2005, shortly after 2:00 a.m., I was contacted by Officer Scott Gent of the DeKalb County Police Department.

Officer Gent stated that he had been dispatched to 580 Rock Springs Court, Atlanta, Georgia ("the Rock Springs Court property") to investigate an activated burglar alarm at the residence.

Officer Gent stated that upon arriving at the property, he was met by Brett Boston, who was a friend of the homeowner, Robert Braddy.

Officer Gent stated that Braddy had called Boston and asked him to go to the residence because the burglar alarm had been activated.

Officer Gent told me that it appeared there had been a forced entry into the Rock Springs Court property through a back door. Officer Gent stated that it appeared the back door had been kicked in.

> Officer Gent requested that I come to the Rock Springs Court property to provide back-up assistance, and I agreed.
>
> I arrived at the Rock Springs Court property at approximately 2:15 a.m. on June 19, 2005.
>
> The Rock Springs Court property is a large, three-story apartment unit, which is located at the end of the building.
>
> Officer Gent showed me the back door, and I agreed that it appeared to have been kicked in.
>
> Officer Gent and I entered the apartment and conducted a protective sweep to look for intruders while Boston remained outside. For officer safety, we searched each room of the property together.
>
> . . . . . .
>
> The entire protective sweep of the Rock Springs Court property lasted approximately ten minutes.

[Record Excerpts 48-3, ¶¶ 1-11, 18].

B. Braddy's Statements to ADT

Claimant Braddy in his deposition stated that on June 19, 2005 he was called "between 12:00 and 1:00 in the morning" by ADT, which reported "they had a report of a break-in at my address." Braddy Depo. p. 92. [Doc. 31].

Q. What did you tell ADT?
A. They asked me should they dispatch the police to my residence.
Q. What was your answer?
A. Yes.
Id.

Braddy then called Brett Boston asking Boston to go to his [Braddy's] home "and make sure that everything was okay." *Id.* Braddy next called ADT to "let them know to let the officer know that Brett would be at my apartment, [and] he was not an intruder." *Id.* ADT asked Braddy to describe Boston which Braddy did. Braddy never communicated with Officer Gent.

C. Panel Opinion's Erroneous Statements and Legal Conclusions

The panel made erroneous statements and unprecedented legal conclusions. First, the panel asserted that, "[h]e [Gent] knew the homeowner had requested the police to investigate the possible burglary." Opinion * 3. The Record does not support this assertion. All Gent stated after being dispatched "to investigate an activated burglar alarm" was that he was told by the dispatcher that "an unknown male, who did not have the code to deactivate the alarm, was at the Rock Springs Property;" that on arriving at the property he "spoke with Brett Boston" who "told [him] that the homeowner was out of town;" that Boston "was a friend of Braddy's" and that "Braddy had called and asked [Boston] to respond to the residence because of the activated alarm." *supra*, p. 4-5. Officer Gent did not state that he "[knew] the homeowner had requested the police to investigate the possible burglary", and the panel Opinion was incorrect when

it so stated, as no reasonable inference from Gent's statements supports such an assertion.

Second, the panel erroneously stated that "Braddy's entire theory of unlawful search rests on the fact that Gent walked outside after the 'quick walk' through and then, with a second officer, re-entered the premises to make sure there was no intruder present." Opinion * 3. To be sure, Braddy focused in his written submissions, including his supplemental letter brief, on Gent's second warrantless entry as being without exigent circumstances; however, it was not Braddy's "entire theory". Braddy did not concede that Gent's initial warrantless entry was in fact lawful; i.e. based on probable cause *and* exigent circumstances.[2]

Regardless of the panel's characterization of Braddy's theory, it clearly erred through omission when it stated that Gent and Violette entered Braddy's home "again to look for an intruder" and later "to make sure there was no intruder present." Opinion * 3. The officers stated the purpose of their warrantless entry into Braddy's home was to engage in a "protective sweep", looking for an intruder, *supra*, p. 6-7. The words "protective sweep" and their meaning have legal significance well understood by law enforcement officers.

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[2] Braddy's counsel admittedly cannot recall whether any responses he made during oral argument "conceded" Gent's initial entry as being based on probable cause *and* exigent circumstances. If so, then he erred, as Braddy does not concede that Gent's initial entry into his home was lawful. It was the government's burden to so prove. *Davis*, 313 F.3d at 1302.

D. Protective Sweep

"A 'protective sweep' is a quick and limited search of premises, *incident to an arrest* and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093 (1990). (emphasis added). The Record reflects that Boston was arrested outside Braddy's home.[3] The lower court accepted that Boston was arrested between Gent's initial warrantless entry and his second warrantless re-entry. 3:52:2. Gent and Violette's stated purpose of entering Braddy's home to engage in a "protective sweep" looking for an intruder contextually corroborates Boston as to the timing of Boston's arrest. However, the warrantless entry was not legally justified as a "protective sweep".

In *United States v. Chaves*, 119 F.3d 687, 692 (11th Cir. 1999) this Court stated "*Buie* requires officers to have 'a reasonable basis for believing that their search will reduce the danger of harm to themselves or violent interference with their mission...". Here, as in *Chaves*, "the government [ ] failed to point to any 'specific and articuable' facts that would lead a reasonably prudent officer to believe that, at the time of the sweep, a sweep was necessary for protective purposes." *Id.*

---

[3] Boston claimed that after Gent's initial search, Gent left Braddy's home. 3:36:3 ¶ 8. Later, Boston left the home approaching Gent who was in the parking lot. *Id.* Boston stated that Gent then placed him (Boston) under arrest based on an outstanding warrant for a probation violation. 2:31:1 ¶¶ 19-20; 3:36:3 ¶ 9; 3:48:A: ¶¶ 20-21. Gent disputed the timing of Boston's arrest, claiming it occurred after Violette had arrived and after the second warrantless search. 3:48:A: ¶¶ 19-21. Both men agreed the arrest was outside the home. *Id.*

Gent had previously searched the home and found no one inside.

Regardless of when Boston was arrested, the Record is devoid of any facts justifying the second warrantless entry based on a "protective sweep". "I entered [Braddy's home] ...took a quick walk through the residence to see if anyone was inside [;]...I did not see anyone inside the residence, and I went outside." *supra*, p. 5. Based on the law of "protective sweeps", the government failed to prove that Gent and Violette had specific and articuable facts that would lead a reasonably prudent officer to believe that a sweep was necessary for protective purposes; nor was the sweep necessary based on exigent circumstances.

E. Initial Warrantless Entry Lacked Exigent Circumstances

Without explanation, the panel Opinion found that Gent's initial warrantless entry into Braddy's home was based on exigent circumstances. Opinion * 4. This was error. Braddy was contacted by ADT between 12:00 and 1:00 a.m. Gent was not dispatched to Braddy's home until 1:50 a.m., arriving at 2:05 a.m. He was told "to investigate an activated burglar alarm." *supra*, p. 5. Gent was also informed that he would meet "an unknown male, who did not have the code to deactivate the alarm." *Id.* Gent met Boston, learned he was a friend of the "homeowner" *and had a key to the home*. *Id.* The alarm was deactivated by Gent. R.E. 35-2, ¶ 5. An inspection of the premises by Gent revealed "that someone had made forced entry into the [home] through a rear door." *supra*, p. 5. Gent thereafter "entered the home...to see if anyone was inside." *Id.*

"To justify a warrantless search, [ ] there must also exist exigent circumstances in addition to probable cause." *United States v. Burgos*, 720 F.2d 1520, 1525 (11th Cir. 1983). "The test of whether exigent circumstances exist is an objective one." *Id.*, citing *United States v. Young*, 909 F.2d 442, 446 (11th Cir. 1998). Here, from the time of ADT contacting Braddy until Gent's arriving at Braddy's home, approximately one hour had elapsed. Boston already was at Braddy's home when Gent arrived. Indeed, Boston had entered Braddy's home, discovering the front door to be unlocked, walked through it and saw that the back door had been kicked in from the outside. R.E. 35-2, ¶ 4. The alarm was activated throughout this time. There is no evidence the alarm was silent. It was more than reasonable that any intruder would have long fled.

Gent's initial entry into Braddy's home was not based on any recognized exception for exigent circumstances. *See Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d. 486 (1978); *Johnson v. United States*, 333 U.S. 10, 14-15, 68 S.Ct. 367, 369 (1948); *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991) (*en banc*). Gent's entry clearly was not a circumstance involving "hot pursuit". *United States v. Santana*, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 2407-2410, 49 L.Ed.2d. 300 (1976) (Hot pursuit means some sort of chase, but need not be an extended chase through the public streets). Gent was not chasing any person. Nor was his entry objectively based on "fleeing suspects". *See United States v. Mesa*, 660 F.2d 1070, 1078 (5th Cir. 1981) (Unit B). Gent was simply curious and "entered [Braddy's] home...to see if anyone was inside." Gent had no knowledge anyone was, in fact, inside. He just wanted to find out. Gent

proffered no evidence of any "fleeing suspect". A desire "to see if anyone was inside [Braddy's home]" is legally insufficient to justify a warrantless entry, particularly when there was time to obtain a warrant.

The panel Opinion infers without specifically finding that Gent's initial entry was based on the need to preserve evidence. ("A fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement" citing *Georgia v. Randolph*, 547 U.S. 103, 117, 126 S.Ct. 1515, 1525 n.6 (U.S. 2006). Opinion * 3. But "looking for anyone inside" as a basis to engage in a warrantless entry, as Gent stated, is not the legal equivalent of "preserving evidence." There was no evidence presented by Gent indicating that any evidence of a burglary was subject to being destroyed. There was simply no emergency. More importantly, there was time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (no exigent circumstances if there was time to secure warrant).

First, "[t]he appropriate inquiry is whether the facts...would lead a reasonable experienced agent to believe that evidence might be destroyed *before a warrant could be secured*. *Burgos*, *supra* at 1525. Gent proffered no facts which objectively indicate that evidence might be destroyed. The government failed to show any such facts. Further, there is no evidence indicating that there was no time to secure a warrant.[4]

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[4] "A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search. (cites omitted) ([T]he privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.") (cites omitted) ("The warrant requirement...is

Second, the panel Opinion without any factual and legal support stated "[a] request by a property owner to the police to search a home for a burglar may, in and of itself create 'exigent circumstances'." Opinion * 4 n.2. Here, Braddy did not ask the police to search his home, nor can it be inferred that he did. Consent, as a basis for a warrantless search of a home should never be implied. *See United States v. Gonzales*, 71 F.3d 819, 830 (11th Cir. 1996). Gent did not ask Boston for consent to search Braddy's home. Without any articuable basis to "preserve evidence", Gent simply searched the home, "looking for anyone inside". This initial warrantless entry was not based on exigent circumstances, and it was error for the panel to so find. Opinion * 4.

The panel Opinion, using hypothetical scenarios apparently seeking to justify its unprecedented position, asserted "[t]he court cannot draw a bright line for when exigent circumstances cease to exist." Opinion * 3. But exigent circumstances never existed, and Braddy never conceded that "exigent circumstances would still be in place" had Gent remained in Braddy's home waiting for Violette; another mis-characterization by the panel of Braddy's position. *Id.* Gent's so-called "quick walk" through Braddy's three-story home was complete and sufficient for Gent to conclude "I did not see anyone inside the residence." *supra*, p. 5. Gent did not limit the scope of his initial search. He went from room to room and floor to floor, *supra*, p. 6. The only reasonable inference to be drawn from Gent's statements is that

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not an inconvenience to be somehow 'weighed' against the claims of police efficiency"). *Georgia v. Randolph*, *supra* at 1525, n. 5.

he searched the entire home. Violette stated that the second sweep of the entire home "lasted approximately ten minutes". *supra*, p. 7. Gent's "quick walk" between 2:05 a.m. and 2:15 a.m., took approximately the same time as the second "protective sweep". There was no legal justification for the second search as no exigent circumstances existed. Gent knew no person was in the home. He sought a plausible excuse to engage in an unconstitutional search. *See United States v. Lynch*, 934 F.2d 1226 (11th Cir. 1991) (arrest of co-conspirators away from residence insufficient to justify a warrantless entry into a home); *United States v. Tovar-Rico*, 61 F.3d 1529 (11th Cir. 1995) (warrantless search of apartment by police after making an arrest in parking lot not lawful based on claim of exigent circumstances).

CONCLUSION

The government failed to meet its burden of proof in showing both probable cause and exigency in Gent's two warrantless searches of Braddy's home. The panel Opinion in contravention of established Supreme Court decisions and this Court's precedent erroneously found exigent circumstances for Gent's warrantless searches. In so doing, the panel Opinion improvidently filled the holes in the government's proof. The entire Court should grant Claimants' petition for *en banc* hearing to correct the panel Opinion's errors and conform this case to established law.

Respectfully submitted, this 20th day of August, 2008.

_____

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